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Supreme Court of the United States

OCTOBER TERM—1942

No. 571

In the Matter

—of—

SURF ADVERTISING CORPORATION,

Debtor.

MAX ROCKMORE, as Trustee in Bankruptcy of SURF ADVERTISING CORPORATION,

Petitioner,

MATHILDE LEHMAN and JOSEPH S. ABRAMS,

Respondents.

BRIEF OF RESPONDENT, JOSEPH S. ABRAMS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Statement of Controversy.

The controversy involved the validity and effectiveness as against the Trustee in Bankruptcy of assignments of contracts and moneys due and to become due thereunder, given to respondent Abrams in connection with advances made and to be made by Abrams to Surf Advertising Corporation, the Debtor in Reorganization. These assignments were executed and delivered more than two years prior to the filing of the involuntary petition for reorganization of the debtor,

for present adequate considerations. The Referee in Bankruptcy, after full trial of the issues, held that under New York law said assignments were present effective transfers of choses in action and divested Surf of contractual rights in respect to the moneys to become due under said contracts; that no other action was necessary to perfect the complete transfer of those rights; and that the said assignments were not affected by the provisions of the Bankruptcy Act. This ruling was affirmed by the District Court and further unanimously affirmed by the Circuit Court of Appeals.

The trustee, petitioner, contends that, even though these assignments, expressly stated that Surf assigned to Abrams all of its right, title and interest in and to the said contracts and the moneys to become due thereunder, they nevertheless must be construed to be merely promises to pay out of future funds and could not confer any rights on Abrams, until the payments were made by the obligor under the terms of said contracts; that Abrams would not be entitled to any of the money which became due and payable during the period of four months prior to the bankruptcy because that would be a preference under Section 60a of the Bankruptcy Act.

Summary of Argument.

1. No ground for writ of certiorari is shown because the Court below correctly held that the controversy herein involved only the interpretation of the New York law as applied to the construction, validity and effectiveness of assignments of contracts and the moneys payable thereunder; that said substantive law of New York does not conflict with the Bankruptcy Act; and that this Act does not impair the effectiveness of a valid assignment of moneys to become due under an existing contract.

2. The Court below correctly ruled that, since the assignments to respondent Abrams, under New York law, were perfected when they were made two years prior to bankruptcy and were good "against a bona fide purchaser," they were also good against "a trustee in bankruptcy," and therefore the Bankruptcy Act did not affect its decision.

POINT I.

No ground for writ of certiorari is shown because the Court below correctly held that the controversy herein involved only the interpretation of the New York Law as applied to the construction, validity and effectiveness of assignments of contracts and the moneys payable thereunder; that said substantive law of New York does not conflict with the Bankruptcy Act; and that this Act does not impair the effectiveness of a valid assignment of moneys to become due under an existing contract.

The Circuit Court of Appeals by a divided Court first ordered a reversal of the judgment in favor of the assignee of the contracts directed by the trial Court, holding that the transaction did not constitute an assignment *in praesenti* of an existing contract, but a mere promise to pay funds to arise in the future and so void as against creditors (128 Fed. (2d) 564). Reargument being allowed and a number of the leading banks in New York being permitted to intervene, they filed a joint brief *amici curiae* seeking to vindicate the immemorial banking practice in New York of taking, as collateral for loans, assignments of existing contracts under which future payments would be made or earned. This reargument resulted in the Circuit Court unanimously reversing its first decision and in its affirming the judgment of the trial Court (129 Fed. (2d) 892). The careful and

full statement of grounds there made by Judge Augustus N. Hand is a complete answer to the petition for certiorari and should bring about a denial of the petition. Leave is taken however to show that the contentions of the petitioner are without merit.

The petitioner has entirely misconceived the purport of the unanimous decision of the Court below for he argues in several places that the Court below ignored and disregarded the Bankruptcy Act and relied only on the New York law which the petitioner says is in conflict with the Bankruptcy Act. A mere reading of the opinion of the Court below will completely refute these contentions for it pointed out "We cannot agree with Appellant's contention that Section 60a of the present Bankruptcy Act affects our decision." It then quotes from said section that "a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein" (R. 372), and then states:

> "It has long been the New York law that such an assignment is good against a bona fide purchaser even though the bona fide purchaser is the first to give notice to the obligor (citing cases). The same thing is true of an execution creditor or of a trustee in bankruptcy (citing cases)."

The opinion therefore clearly demonstrates that this case involved only consideration of the New York law which in no wise conflicts with the Bankruptcy Act.

The decision sought to be reviewed herein followed the rule clearly enunciated in *Hiscock* v. *Varick Bank*, 294 U. S. 216, 55 S. Ct. 394, 79 L. Ed. 869, where this Court said:

"The contracts of pledge were made, executed and to be performed in the State of New York, and the rights of the parties were governed by the law of that state. * * * The questions of the extent and validity of the pledge were local questions, and the decisions of the Courts of New York are to be followed by this Court (pp. 37-38). * * * The contracts under which they were pledged were valid and enforcible under the laws of New York where the debt was incurred and the lien created. The Bankruptcy Act did not attempt by any of its provisions to deprive the lienor of any remedy which the law of the state vested him with; * * * " (p. 41).

See also: *Lerner Stores Corporation* v. *Electric Maid Bake Shops* (5th Cir.), 24 Fed. (2d) 780, 782; *In Re Knox-Powell-Stockton Co.* (9th Cir.), 100 Fed. (2d) 979, 982; *General Motors Acceptance Corporation* v. *Coller* (6th Cir.), 106 Fed. (2d) 584, cert. den. 60 Sup. Ct. 723, 309 U. S. 682, 84 L. Ed. 1026; *Matter of Talbot Canning Corporation* (D. C. Md.), 35 F. Supp. 680; *Associated Seed Growers, Inc.* v. *Geib, Trustee, et al.*, 125 F. (2) 683; *In re: Seim Construction Co.*, 37 F. Supp. 855 (D. C. Md., 1941).

Prudence Realization Corporation v. *Geist* (decided April 27, 1942, 62 S. Ct. 978, Advance Sheets of May 15, 1942) (p. b. 15) is clearly distinguishable. This Court, after referring to the New York cases on the issue therein involved, pointed out:

"Nothing decided in Erie Railroad Co. v. Tompkins, supra, requires a Court of bankruptcy to apply such a rule governing the liquidation of insolvent estates * * * we are unable to say that the rule laid down is other than one of state law governing relative rights of claimants in a state liquidation" (p. 95).

and

> "Since the New York rule, in the absence of an actual agreement to subordinate the guarantor, is merely a general rule of law governing insolvency proceedings it is not controlling in bankruptcy" (p. 97).

In the instant case the rule of New York was applied only to construe the effectiveness of an assignment of a contract.

The distinction between the *Prudence* case and the one at bar is clearly illustrated in *Prudence Company, Inc.*, 82 Fed. (2d) 755, cert. den. 298 U. S. 685, 56 S. Ct. 787, where the Court relied on and applied New York law in construing contracts existing between The Prudence Company, Inc., and Prudence-Bonds Corporation with certificate holders as contracts made, executed and to be performed in the State of New York, in spite of the filing of petitions for reorganization of each of these corporations in the Federal Court under Section 77B of the Bankruptcy Act. The Court there at page 757 said:

> "The contract was made and was to be performed in New York concerning trust property there. We adopt the construction of the highest court in that state as to its meaning and effect. Hiscock v. Varick Bank, 206 U. S. 28, 27 S. Ct. 681, 51 L. Ed. 945; Prudential Ins. Co. of America v. Liberdar Holding Corporation (C. C. A.), 72 F. (2d) 395."

For the same reasons *Jennings, Receiver,* v. *U. S. Fidelity & Guaranty Co.*, 294 U. S. 216, 55 S. Ct. 394, 79 L. Ed. 869 (p. b. 15) and *Yonkers* v. *Downey, Receiver,* 309 U. S. 590, 597, 60 S. Ct. 796, 84 L. Ed. 964 (p. b. 16) relating to National Banks are not applicable. The *Jennings* case

involved a direct conflict between state and federal law and the *Yonkers* case merely held that the state law did not authorize National Banks to pledge their assets.

POINT II.

The Court below correctly ruled that, since the assignments to respondent Abrams, under New York Law, were perfected when they were made two years prior to bankruptcy and were good "against a bona fide purchaser," they were also good against "a trustee in bankruptcy," and therefore the Bankruptcy Act did not affect its decision. The decision sought to be reviewed is not in conflict with decisions in other Circuit Courts.

The real contention of the petitioner in the Court below was that, under the New York law, the assignments of the contract in question should be construed as mere promises to pay out of future funds, and as such were not enforcible against a trustee in bankruptcy as to moneys which became payable under said contracts within four months of the bankruptcy. That same argument is made under "Point II" of petitioner's brief herein and the cases cited and claimed to be in conflict with the decision in the case at bar involved agreements to pay out of particular funds or agreements or promises to make transfers or mortgages in the future. Firstly, these agreements did not involve assignments *in praesenti* of existing contracts, and secondly, those cases in any event cannot be said to be in conflict with the instant case because they also involved the application of state law as to the validity and effectiveness of assignments.

In each of the said assignments Surf, for valuable considerations therein set forth, stated that it "does hereby

sell, assign, transfer and convey unto you, Abrams & Co., all right, title and interest" in the said contracts and the moneys to become due thereunder. Then followed a description and identification of the contract and the terms thereof (R. 299-300). In addition, Surf delivered to Abrams the monthly invoices for the services rendered to the obligor and each of said invoices contained the endorsement "For value received this invoice is assigned to Abrams & Co.," and all checks issued by Calvert to Surf for the payments made under the said contracts were physically delivered to and deposited by Abrams (R. 301).

It is the well settled law of New York that such assignments of existing contracts and the moneys to become due thereunder are present effective transfers of choses in action and immediately divest the assignor's contractual right in respect of those moneys and no notice or further action is necessary in order to perfect the complete transfer of that right. *Kniffin* v. *State of New York,* 283 N. Y. 317 (1940) reargument den. 284 N. Y. 593, cert. den. 312 U. S. 690; *Williams* v. *Ingersoll,* 89 N. Y. 508; *Devlin* v. *Mayor, et al.,* 63 N. Y. 8; *Superior Brassiere Co. Inc.* v. *Zimetbaum,* 214 App. Div. 525; *Salem Trust Co.* v. *Manufacturers Finance Co.,* 264 U. S. 182; *In re: New York, N. H. & H. R. Co.,* 25 F. Supp. 874 (D. Conn. 1938).

The Referee and the District Court, on undisputed facts, found that there was a valid and adequate present consideration for the assignments in question (R. 304, 319). The assignments are, therefore, valid and enforcible against subsequent assignees, judgment creditors and trustees in bankruptcy. *In re Barnett,* 124 F. (2d) 1005 (C. C. A. 2nd, 1942); *In re: New York, N. H. & H. R. Co., supra,* page 7; *Kniffin* v. *State of New York, supra,* page 7; *McCorkle* v. *Herrman,* 117 N. Y. 297 (1889); *Niles* v. *Mathusa,* 162 N. Y. 546 (1900); *Bates* v. *Salt Springs National Bank,* 157 N. Y. 322; *Williams, et al.* v. *Ingersoll, et al., supra,*

page 7; *Hofferberth* v. *Duckett,* 175 App. Div. 480 (1916); *Harris* v. *Taylor,* 35 App. Div. 462 (1898), appeal dismissed 159 N. Y. 533; *Conley* v. *Fine,* 181 App. Div. 675 (1918); A. L. I. Restatement of the Law of Contracts, Sections 154, 161.

The purpose of an assignment, whether as a sale or as security, is immaterial in determining its validity and effectiveness as a transfer of contract rights. *In re*: *New York, N. H. & H. R. Co., supra,* page 7; *Niles* v. *Mathusa, supra,* page 8; Restatement of the Law of Contracts, Section 150.

An assignment of moneys to become due under an existing contract, while termed an "equitable" assignment for historical reasons, is, under the law of New York, both in equity and at law, a completed transfer of the assignor's right to receive those moneys when they become due, without any further act of either of the parties. *Superior Brassiere Co., Inc.* v. *Zimetbaum, supra,* page 7; *Williams, et al.* v. *Ingersoll, et al., supra,* page 7; *Hooker* v. *Eagle Bank of Rochester,* 30 N. Y. 83 (1864), where the Court, citing Section 111 of the Code as then in effect, said that "an assignment, valid as an equitable assignment is equally valid at law"; *M. Witmark & Sons* v. *Fred Fisher Music Co.,* 125 F. (2d) 949, 953 (C. C. A. 2nd, 1942); New York Personal Property Law, Sec. 41; Corbin, Cases on Contracts (2nd Ed.), pages 1019, *et seq.*

Not only is the transfer of rights completed by the assignment, but this transfer is "perfected," within the meaning of section 60a, at the time of the assignment, for the assignor thereby divests himself of all right and interest in or to the moneys to become due and no bona fide purchaser or creditor of the assignor could thereafter acquire any rights in the property transferred, superior to the rights of the assignee. *Salem Trust Co.* v. *Manufacturers Finance Co., supra,* page 7; *In re*: *Barnett, supra,* page 8; *Bates* v. *Salt*

Springs National Bank, supra, page 8; Hamilton, "The Effect of Section Sixty of the Bankruptcy Act Upon Assignments of Accounts Receivable" (1939), 26 Va. L. Rev. 168 at pp. 178 *et seq.*; Neuhoff, "Assignment of Accounts Receivable as Affected by the Chandler Act" (1940), 34 Ill. L. Rev. 538.

In passing it may be noted that on page 6 petitioner claims that the fund in question " 'was in the possession or under the control of the bankrupt at the date of bankruptcy' and therefore was impressed with a lien in favor of your petitioner * * * superior to that of the respondents." A similar contention is made on page 19. These assertions are erroneous, as may readily be seen from the opinion of Judge Leibell:

> "in November of 1939 (prior to the bankruptcy) Abrams had commenced a suit in the New York Supreme Court to recover from Calvert monies he claimed were due him under the several assigned contracts. Calvert moved to interplead the different claimants and the motion was granted. Before an order was signed the trustee obtained a stay and later all the parties, by stipulation, agreed to have their rights determined by the referee herein" (R. 318).

Pursuant to and for the express and limited purposes of that stipulation the moneys were deposited with the Clerk of the District Court (R. 317, 318). Subsequently, on the order of that Court the moneys in question were paid to Abrams. Under these undisputed facts the moneys were never in the control of the bankrupt.

On pages 33-35 petitioner cites three cases which considered Section 60a after the 1938 amendment. They do not support petitioner but rather are authorities for respondent and support the decision of the Court below.

In the *Matter of Talbot Canning Corporation* (D. C. Md.), 35 F. Supp. 680 (p. b. 33), the Court held: (1) That the claim of a creditor based on assignments was to be determined by the law of the state wherein the assignments were made (p. 685); and (2) "Referring to the objection that the subject matter of the contract in the present case was not in existence at the time the contract was made, it is sufficient if the contract itself was in existence" (p. 684).

Similar holdings were made in *Associated Seed Growers, Inc.* v. *Geib, Trustee, et al.*, 125 F. (2) 683 (p. b. 34), where the Court pointed out:

> "the validity of an assignment is to be tested by reference to the time when it is made, and if it is not preferential then it does not become so because the funds assigned came into the debtor's hands within four months of the bankruptcy. Union Trust Co. v. Townshend, 4 Cir. 101 Fed. 2nd, 903 (Cert. Den. 307 U. S. 646, 59 S. Ct. 1044; 83 L. Ed. 1526)."

That is precisely the ruling in the instant case now attacked by petitioner.

In re: Seim Construction Co., 37 F. Supp. 855 (D. C. Md., 1941) (p. b. 35), the Court also held that the question whether an assignment became so far perfected that no bona fide purchaser from the bankrupt could subsequently have acquired any superior rights in the assigned funds, was to be determined by the law of Maryland, and that, since the assignee had not given notice as required by the law of Maryland, the assignment would be deemed perfected as of the date when the assignee filed his claim in the receivership proceedings, which was the first notice given to the obligor.

The application of state law on the question of the effectiveness of assignments is also illustrated in *Quaker City*

Sheet Metal Co., 129 Fed. (2d) 894 (C. C. A. 3, 1942), where it was held that an assignment of accounts receivable will be deemed perfected according to the law of Pennsylvania where the assignment was made. Since under that law notice was required to be given to the obligor in order to perfect the assignment, and no such notice had ever been given, the assignment would be deemed perfected immediately before bankruptcy and hence would be security for an antecedent indebtedness within the meaning of Section 60a of the Bankruptcy Act.

See also: *In re*: *Imperial Brewing Co.*, 127 Fed. 2d, 766, 768 (C. C. A. 3, 1942); *in re*: *L. H. Duncan & Sons*, 127 Fed. 2d 640, 641-642 (C. C. A. 3, 1942); *Mutual Life Insurance Co.* v. *Menin*, 115 Fed. 2d, 975, 977 (C. C. A. 3, 1942), which arose subsequent to the enactment of the Chandler Act, wherein it was held that, in contests between the holders of assignments and trustees in bankruptcy, the validity and effectiveness of the assignments are governed by the law of the state where they were made.

CONCLUSION.

The issue decided by the Court below merely involved substantive State Law which did not conflict with the Bankruptcy Act and therefore there is no ground for a writ of certiorari and the petition for this writ should be denied.

Respectfully submitted,

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